

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

IN RE: DIGITEK® PRODUCTS LIABILITY
LITIGATION

MDL NO. 1968

THIS DOCUMENT RELATES TO ALL CASES

PRETRIAL ORDER #64
(Re: Settlement Agreement and Deadlines)

The Court is advised that Lead Counsel for the parties executed a Settlement Agreement (the “Agreement”) on September 1, 2010 establishing a program for the settlement of cases filed in MDL 1968 (“MDL Cases”), claims subject to tolling agreements (“Tolled Claims”), and cases filed in state courts involving Digitek® (“State Cases”).

I. AUTHORITY OF COURT TO OVERSEE SETTLEMENT

This Court has both inherent and equitable authority under federal law, and express authority under the terms of the Agreement, to preside over and manage various aspects of the Agreement including, but not limited to, the entry of Orders establishing time frames for the completion of acts defined in the Agreement. Fed. R. Civ. P. 16(a)(5), (d); *In re Vioxx Products Liability Litigation*, 650 F. Supp. 2d 549 (E.D. La. 2009); *In re Propulsid Products Liability Litigation*, 2004 WL 305816 (E.D. La. 2004). The instructions herein are to be construed as orders of this Court.

II. MDL CASES AND TOLLED CLAIMS

All MDL Cases and Tolled Claims are automatically enrolled in the settlement program unless an MDL Case or Tolled Claim submits a “Notice of Intent to Opt Out Form,” available at <http://www.wvsc.uscourts.gov/MDL/forms.htm>, by the “Notice Deadline” set forth in this Pre-

Trial Order. MDL Cases and Tolled Claims that do not timely submit a “Notice of Intent to Opt Out Form” shall further submit a Claim Package, as detailed in the Agreement, by the “Claim Deadline” set forth in this Pre-Trial Order to be eligible for an award under the settlement program.

MDL Cases that do not submit a “Notice of Intent to Opt Out Form” and do not timely submit a Claim Package will be subject to dismissal with prejudice upon motion by the Defendants following the “Claim Deadline.” MDL Cases that do not submit a “Notice of Intent to Opt Out Form” and timely submit a Claim Package will execute a stipulation of dismissal with prejudice that will be filed within five (5) business days after submission of the Claim Package.

III. STATE CASES

The parties are permitting state cases to participate in this settlement. State Cases are not automatically enrolled in the settlement program but rather, must take affirmative action to participate. The parties have agreed that State Cases that intend to participate in the settlement program must submit a “State Case Notice of Intent to Opt In Form,” available at <http://www.wvsc.uscourts.gov/MDL/forms.htm>, by the “Notice Deadline.” The parties have also agreed that State Cases that submit a “State Case Notice of Intent to Opt In Form” shall further submit a Claim Package, as detailed in the Agreement, by the “Claim Deadline” to be eligible for an award under the settlement program.

State Cases that submit a “State Case Notice of Intent to Opt In Form,” but do not submit a Claim Package, will be subject to dismissal with prejudice upon motion by Defendants following the “Claim Deadline.” Such motions will be made to the State Judge presiding over a specific case where such a “Claim Deadline” is not met. State Cases that submit a “State Case Notice of Intent to Opt In Form” and timely submit a Claim Package will execute a stipulation of

dismissal with prejudice that will be filed within five (5) business days after submission of the Claim Package. Such filing will take place in the State Court where the claim is pending. State Court judges shall retain jurisdiction over State Court Cases, and exclusive jurisdiction over the termination of Plaintiff rights to sue Defendants.

III. SETTLEMENT PROGRAM DEADLINES

<p><u>Execution date of Settlement Agreement to 11:59 p.m. on October 15, 2010 (the “Notice Deadline”)</u></p>	<p>Window of time for individual MDL Cases and TOLLED Claims to opt out of the settlement program by submitting the “Notice of Intent to Opt Out Form.”</p> <p>and</p> <p>Window of time in which State Cases may voluntarily elect to participate in the settlement program by submitting the “State Case Notice of Intent to Opt In Form.”</p>
<p><u>11:59 p.m. on December 1, 2010</u></p>	<p>Date by which Defendants may exercise their termination right under the Settlement Agreement.</p>
<p><u>December 1, 2010 to 11:59 p.m. on February 1, 2011 (the “Claim Deadline”)</u></p>	<p>Window of time in which settlement program participants may submit claims seeking an award under the settlement program.</p>
<p><u>January 1, 2011</u></p>	<p>Deadline for Plaintiffs’ Steering Committee to file a motion seeking common fund fees and expenses incurred prior to the Notice Deadline, 11:59 p.m. on October 15, 2010.</p>

IV. FORM SUBMISSION

“Notice of Intent to Opt Out Forms” and “State Case Notice of Intent to Opt In Forms” must be submitted to the Special Master, Negotiating Plaintiffs’ Counsel, and the Defendants in one of the following ways:

- (1) By email, delivery and read receipt requested, on or before the deadlines set forth above to Specialmaster@digitekclaims.net, Digitekclaims@tuckerellis.com, and Digitekclaims@motleyrice.com; or,

(2) By United States Mail or other carrier, post-marked on or before the deadlines set forth above, return receipt requested, to all of the following:

i) Special Master

Special Master Digitek Claims
Smith, Cochran & Hicks, P.L.L.C.
Post Office Box 2553
Charleston, West Virginia 25329

ii) Negotiating Plaintiffs' Counsel:

Meghan Johnson Carter, Esq.
Motley Rice
28 Bridgeside Boulevard
Mount Pleasant, South Carolina 29464

iii) Defendants:

Jaclyn A. Bryk, Esq.
Tucker Ellis & West, LLP
925 Euclid Avenue
1150 Huntington Building
Cleveland, Ohio 44115

V. SETTLEMENT AGREEMENT DISTRIBUTION

Negotiating Plaintiffs' Counsel shall email a copy of the Agreement to all counsel identified on the Court's ECF/CM for MDL 1968 using the email addresses identified on the Court's website at <http://www.wvsc.uscourts.gov/MDL/pdfs/AttorneyListMDL1968.pdf> by Friday, September 3, 2010. Negotiating Plaintiffs' Counsel will also send copies of the Agreement to counsel for plaintiffs in State Cases at their last known physical address or email by Friday, September 3, 2010. Other interested parties shall forward requests for copies of the Agreement by email, delivery and read receipt requested, to Meghan Johnson Carter or Jaclyn A. Bryk at the email addresses listed in the preceding paragraph.

The Clerk is directed to file this Order in 2:08-md-1968 which shall apply to each member Digitek[®]-related case previously transferred to, removed to, or filed in this district, which includes counsel in all member cases up to and including civil action number 2:09-cv-01063. In cases subsequently filed in this district, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action at the time of filing of the complaint. In cases subsequently removed or transferred to this court, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action upon removal or transfer. It shall be the responsibility of the parties to review and abide by all pretrial orders previously entered by the court. The orders may be accessed through the CM/ECF system or the court's website at www.wvsc.uscourts.gov.

ENTER: _____

September 1, 2010

Joseph R. Goodwin

Judge Joseph R. Goodwin, Chief Judge